Supreme Court, U.S.
FILED
APR 17 2015
OFFICE OF THE CLERK

No. 14-571

In The Supreme Court of the United States

APRIL DEBOER, et al.,

Petitioners,

v.

RICHARD SNYDER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONERS

KENNETH M. MOGILL
MOGILL, POSNER & COHEN
27 E. Flint St., 2nd Floor
Lake Orion, MI 48362
(248) 814-9470

DANA M. NESSEL
NESSEL & KESSEL LAW
645 Griswold, Suite 4300
Detroit, MI 48226
(313) 556-2300

MARY L. BONAUTO
GAY & LESBIAN ADVOCATES & DEFENDERS
30 Winter St., Suite 800
Boston, MA 02108
(617) 426-1350

CAROLE M. STANYAR
Counsel of Record
221 N. Main St., Suite 300
Ann Arbor, MI 48104
(313) 819-3953
cstanyar@wowway.com

ROBERT A. SEDLER
WAYNE STATE UNIVERSITY LAW SCHOOL
471 W. Palmer St.
Detroit, MI 48202
(313) 577-3968

Counsel for Petitioners

April 17, 2015

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. The Marriage Bans Violate Fundamental And Reinforcing Principles Of Equality And Liberty Which Limit State Action	1
A. The State Concedes The Marriage Bans Inflict Substantial Harms	1
B. The Fourteenth Amendment's Guarantees Of Liberty And Equality Limit State Action	3
II. The Marriage Bans Deny Petitioners Equal Protection Under Any Level Of Scrutiny	8
A. The Marriage Bans Are Subject To Heightened Scrutiny Because They Unequally Burden A Particular Class Of Citizens' Right To Marriage	8
B. The Marriage Bans Are Subject To Heightened Scrutiny Because They Impose Inequality On Individuals Based On Their Sexual Orientation	9
C. The Marriage Bans Fail Rational Basis Review	13
III. The Marriage Bans Deprive Petitioners Of A Fundamental Liberty Interest	22
CONCLUSION	27

TABLE OF AUTHORITIES

Page

CASES

Albright v. Oliver, 510 U.S. 266 (1990).....4

Attorney Gen. of N. Y. v. Soto-Lopez, 476 U.S. 898 (1986).....8

Baker v. Baker, 13 Cal. 87 (1859).....14

Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014).....2

Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).....8

Burns v. Burns, 560 S.E.2d 47 (Ga. Ct. App. 2002).....6

Carter v. Hill, 45 N.W. 988 (Mich. 1890).....13

Christian Legal Socy. v. Martinez, 561 U.S. 661 (2010).....10

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).....7, 15, 17, 19

DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989).....22

Eisenstadt v. Baird, 405 U.S. 438 (1972).....18

FCC v. Beach Communications, Inc., 508 U.S. 307 (1993).....8

Frontiero v. Richardson, 411 U.S. 677 (1973).....21

Gard v. Gard, 169 N.W. 908 (Mich. 1918).....14

Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003).....2

TABLE OF AUTHORITIES – Continued

Page

Griswold v. Connecticut, 381 U.S. 479 (1965) 11, 22, 24, 25

Harper v. Va. St. Bd. of Elections, 383 U.S. 663 (1966) 9

In re Marriage Cases, 183 P.3d 384 (Cal. 2008) 24

Johnson v. Robison, 415 U.S. 361 (1974) 14, 15

Lawrence v. Texas, 539 U.S. 558 (2003) ..... *passim*

Loving v. Virginia, 388 U.S. 1 (1967) 4, 21, 22, 26

Maynard v. Hill, 125 U.S. 190 (1888) 26

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 19

Nguyen v. INS, 533 U.S. 53 (2001) 20

Plessy v. Ferguson, 163 U.S. 537 (1896) 12

Romer v. Evans, 517 U.S. 620 (1996) ..... *passim*

Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623 (2014) 7

State v. Fry, 4 Mo. 120 (1835) 14

Town of Greece v. Galloway, 134 S. Ct. 1811 (2014) 23

Turner v. Safley, 482 U.S. 78 (1987) 22, 24, 25

United States v. Windsor, 133 S. Ct. 2675 (2013) ..... *passim*

W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) 7

TABLE OF AUTHORITIES – Continued

Page

Watson v. City of Memphis, 373 U.S. 526 (1963).....21

Zablocki v. Redhail, 434 U.S. 374 (1978).....4, 9, 22, 26

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 23

U.S. Const. amend. XIV 1, 3, 8, 11, 19

STATUTES

Mich. Comp. Laws §551.2 (2015) 13

OTHER AUTHORITIES

MAY IT PLEASE THE COURT (Peter Irons & Stephanie Guitton eds., 1993) 26

Mich. House Fiscal Agency, *Legislative Analysis: Prohibit Same-Sex Marriages and Similar Unions* (Oct. 25, 2004).....4, 5

Mich. Op. Att'y Gen. No. 7171 (2005) 6

Neb. Op. Att'y Gen. No. 03004 (2003).....6

RESOLVE: The National Infertility Association, Fast Facts about Fertility 16

INTRODUCTION

Despite the State's efforts to justify excluding same-sex couples from marriage, it remains clear that Michigan's marriage bans violate the Fourteenth Amendment. The State's insistent refrain is that the question whether same-sex couples have a right to marry is one for voters and legislators, not for this Court. But it is the office of this Court to enforce Petitioners' constitutional rights to liberty and equality. The marriage bans violate these mutually reinforcing guarantees, which together "demand respect" for the "personal bond" shared by two adult persons of the same sex who love and commit their lives to one another. *Lawrence v. Texas*, 539 U.S. 558, 567, 575 (2003). The bans deny these adults the ability to obtain any legal recognition for their relationships. They deny same-sex couples access to the one institution – marriage – that affirms the dignity of a loving adult couple's "enduring" "bond," *id.* at 567, and the countless protections and benefits that marriage guarantees.

I. The Marriage Bans Violate Fundamental And Reinforcing Principles Of Equality And Liberty Which Limit State Action

A. The State Concedes The Marriage Bans Inflict Substantial Harms

The State never denies the real harms inflicted by depriving same-sex couples of access to marriage. Marriage confers both significant "protection[s] and

dignity," which the marriage bans deny to same-sex couples and their families. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013); *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 955 (Mass. 2003). The bans withhold from same-sex families legal protections for their intimacy and autonomy. Under state law, a marriage license is what entitles each spouse to make legal, medical, and familial decisions for the other spouse as well as their children. Pet. Br. 24-27; American Bar Association ("ABA") Amicus Br. 20 (examples of persons denied access to their dying partners). The bans also deny same-sex families vast economic and legal benefits, including those that facilitate ordinary transactions like purchasing a home. ABA Br. 16, 21-25. In law and civil society alike, the bans demean same-sex families. Marriage is the mechanism by which states deem "a relationship . . . worthy of dignity". *Windsor*, 133 S. Ct. at 2692. The marriage bans, which eliminate all potential suitable marital partners for gay people, confirm the "negative views" of same-sex relationships that define what it means to be gay. *Baskin v. Bogan*, 766 F.3d 648, 658 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014).

Denying marriage to same-sex couples also significantly harms their children. The bans stigmatize these children by deeming their families unworthy of any public status or protection. American Psychological Association ("APA") Amicus Br. 30-32; Family Equality Council Amicus Br. 24-34; Pet. Br. 48. Denying marriage to same-sex couples also

results in a variety of economic and legal inequities for their children and deprives them of the salutary effects of having married parents. See Pet. Br. 11-12; American Sociological Association ("ASA") Amicus Br. 18; Gary Gates Amicus Br. ("Gates") 21-23.

B. The Fourteenth Amendment's Guarantees Of Liberty And Equality Limit State Action

The State's arguments obscure what this case is about: Whether state governments can deny gay people the recognition and protections for their relationships and families that others take for granted. The State conspicuously avoids discussing the marriage bans' substantial affronts to gay people's constitutional liberty and equality, instead invoking federalism and the democratic process. But the Fourteenth Amendment ensures that individuals' rights to equality and liberty are not left to state governments' political processes. Judicial enforcement of these constitutional rights is the essence of our constitutional scheme.

States' general authority to define and regulate marriage is cabined by the imperative to "respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691. The State wrongly disregards Petitioners' claim on the ground that it has "no constitutional tether" because "the Constitution is silent regarding marriage." Resp. Br. 15. But the "components of liberty in its manifold possibilities" are not spelled

out in full detail by the Constitution's text. *Lawrence*, 539 U.S. at 578; *Albright v. Oliver*, 510 U.S. 266 (1990) (Kennedy, J., concurring) (a state measure "that does not contravene one of the more specific guarantees of the Bill of Rights may nonetheless violate the Due Process Clause"). And while the Court has used different labels, it has long recognized the constitutional significance of marriage. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (a "basic civil right[ ]" and "fundamental freedom"); *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978) ("fundamental").

The State nevertheless asks the Court to "entrust[ ] . . . the people . . . to engage in public debate and governance" rather than fulfill its constitutional role to protect Petitioners' basic civil right to marry. Resp. Br. 10. But the origins, broad scope, and harmful message of the bans – and similar state constitutional amendments and statutes enacted in the 1990s and 2000s – illustrate the necessity of judicial action.

The bans were reflexive reactions to legislative developments and state court decisions in Hawai'i and Massachusetts that recognized the promise of equality for same-sex couples. See *Romer v. Evans*, 517 U.S. 620, 623-24 (1996) (noting "[t]he impetus" of invalid law was "ordinances which banned discrimination" on account of "sexual orientation"); Pet. Br. at 7-9. The bans also followed DOMA, which placed a powerful "'thumb on the scales'" to "discourage enactment of state same-sex marriage laws." *Windsor*, 133 S. Ct. at 2693 (citation omitted); see Mich. House Fiscal Agency, *Legislative Analysis: Prohibit*

Same-Sex Marriages and Similar Unions at 2 (Oct. 25, 2004), http://www.house.mi.gov/hfa/archives/pdf/ballot04-02.pdf (last visited Apr. 15, 2015) (citing DOMA).

The enactments went beyond merely excluding same-sex couples from marriage. See *Romer*, 517 U.S. at 632 (explaining that the amendment's "sheer breadth" and "broad and undifferentiated disability" rendered it unconstitutional). Michigan declared that only "one man and one woman" could enter into any "similar union for any purpose." This language was designed to mandate much broader governmental discrimination including, for example, barring same-sex partners from sharing health insurance benefits provided by public employers. Pet. Br. 9. By enacting and then constitutionalizing such comprehensive discrimination, the bans shut down political debate over equality for same-sex relationships and walled off state political process from any discrete protections same-sex couples could seek for their relationships.[1] Human Rights Campaign Amicus Br. 13-15. State officials used the no-similar-union provisions to argue that legislatures and municipalities were

---

[1] Michigan and Kentucky claim that their newly minted statutes were not enacted to discriminate since same-sex couples were already unable to marry. This merely raises the question of what legitimate reason the states had for repeatedly enacting burdensome marriage bans. And a history of excluding same-sex relationships from marriage should not be presumed to be bias-free given the extensive history and legacy of discrimination against gay people. U.S. Amicus Br. 3-6, 17; Organization of American Historians ("OAH") Amici Br. 28-34.

barred from considering or enacting bills that would allow surviving "domestic partners" to bury a deceased partner's remains. See Neb. Op. Att'y Gen. No. 03004 (2003); see also Mich. Op. Att'y Gen. No. 7171 (2005) (marriage bans foreclose laws allowing public employers to provide domestic partners benefits). Courts suggested that the provisions even barred gay parents from visitations with their own children from a prior marriage if the parent lived with a same-sex partner in a civil union and the parent's divorce decree prohibited visitations during "overnight stays with any adult to whom [the parent] was not legally married." *Burns v. Burns*, 560 S.E.2d 47, 48 (Ga. Ct. App. 2002); see Ninety-Two Plaintiffs in Marriage Cases Amicus Br. 25-31.

The state measures also often explicitly or implicitly declared gay people's relationships incompatible with societal values. Michigan proclaimed it had "a special interest in . . . protecting" the "relationship between a man and a woman." Such a committed adult relationship is undoubtedly worth protecting, but the bans' implication is that a committed relationship between gay adults is *not* worth protecting. See Mich. House Fiscal Agency, *supra*, 4-5 (bans' proponents maintained that "[e]fforts to alter traditional marriage are driven by the selfish needs of individuals"). The bans also imply that committed different-sex relationships need protection *from* same-sex relationships. *Id.* (bans' proponents maintained legal recognition of same-sex relationships is "harmful to society and to heterosexual marriage").

The State's message that same-sex relationships are undeserving of legal respect is not a constitutionally acceptable message, regardless of whether it results from a nominally democratic process. See *Lawrence*, 539 U.S. at 578 ("The State cannot demean the[] existence" of gay people.).

The State relatedly suggests that this case is about the "liberty to engage in self-government." Resp. Br. 13. But ours is a constitutional democracy, and citizens do not enjoy the right to "equal[] . . . treatment" or the "substantive guarantee[s] of liberty" only when they persuade political majorities such rights exist. *Lawrence*, 539 U.S. at 575; see *Romer*, 517 U.S. at 632-33; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); Pet. Br. 28. "[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections." *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). The mere fact that states have voted on whether same-sex couples may marry does not mean these couples have no right to do so.

For all of these reasons, the Court should firmly reject the State's claim that Petitioners are "weaken[ing] democracy" by asking that their constitutional rights be enforced. Resp. Br. 15. "[W]hen hurt or injury is inflicted . . . by the encouragement or command of laws . . . the Constitution requires redress by the courts." *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014) (Kennedy, J.); see Mehlman Amicus Br. 28-29. No sound constitutional principle permits the Court to stand aside and allow a

political process steered by "want of . . . careful reflection" or past fears to disadvantage same-sex families, especially when the bans may have closed off the political process to proponents of same-sex couples marrying and those who have changed their minds. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

II. The Marriage Bans Deny Petitioners Equal Protection Under Any Level Of Scrutiny

A. The Marriage Bans Are Subject To Heightened Scrutiny Because They Unequally Burden A Particular Class Of Citizens' Right To Marriage

1. The State's efforts to avoid application of the Equal Protection Clause are unavailing. The State claims that "judicial restraint" defines rational-basis review. Resp. Br. 29-31. But this Court's cases the State cites do not involve burdens on fundamental rights or government institutions with such profound significance as marriage; one case noted that the scope of judicial review would be different if it did. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (defining rational basis review for a "classification that" did not "infringe[ ] fundamental constitutional rights"). Unequal burdens on fundamental rights require heightened scrutiny even where the burden is on a class that would not otherwise trigger heightened review. *Attorney Gen. of N. Y. v.*

Soto-Lopez, 476 U.S. 898, 902 (1986); *Harper v. Va. St. Bd. of Elections*, 383 U.S. 663, 670 (1966).

2. The State expresses concern about future hypothetical challenges to other types of marriage restrictions. Resp. Br. 23, 27. But wherever the line of delineating permissible marital restrictions is drawn, it cannot be drawn on sexual orientation alone. The constitutional guarantee of liberty allows "persons in a homosexual relationship [to] seek autonomy" for personal choices relating to "marriage, procreation, . . . family relationships, [and] child rearing" "just as heterosexual persons do." *Lawrence*, 539 U.S. at 567, 574-75. The bans violate this guarantee of liberty because they eliminate any possible spouse for gay people by not allowing gay people to marry consistent with their sexual orientation. They "absolutely prevent[]" gay people "from getting married." *Zablocki*, 434 U.S. at 387. Other marriage restrictions regarding age, consanguinity, or bigamy do not similarly exclude particular classes of people from marrying.

B. The Marriage Bans Are Subject To Heightened Scrutiny Because They Impose Inequality On Individuals Based On Their Sexual Orientation

1. The bans discriminate based on sexual orientation because they prevent all gay couples from marrying consistent with their sexual orientation. The State characterizes the classification as one of

"biological complementarity" instead of sexual orientation. Resp. Br. 46, 52. But that is just another way of describing the fact that the laws do not allow same-sex couples to wed and, therefore, exclude all gay people from marrying.

The State's efforts to evade this reality highlight why classifications based on sexual orientation should receive no presumption of constitutionality. The State denies that sexual orientation is "a particular 'characteristic' at all." Resp. Br. 51. But this Court has made clear that for purposes of sexual orientation, "status and conduct" are linked: Laws that target "homosexual conduct" – acting on a same-sex sexual orientation – target "homosexual persons." *Christian Legal Socy. v. Martinez*, 561 U.S. 661, 689 (2010); *Lawrence*, 539 U.S. at 575; see APA Br. 10. The State relatedly assures the Court that "the long history of unfair treatment against same-sex *conduct*" is "not what this case is about." Resp. Br. 52 (emphasis added). But the bans exclude same-sex couples from marriage based on those couples' orientation toward a person of the same sex; denying same-sex marriage is therefore inextricably linked to discriminating against gay people. And there are reasons to believe Michigan's recent laws are about "unfair treatment" of gay people: The bans were enacted abruptly when some states seemed likely to allow same-sex couples to marry, and they follow on the long history of criminalizing same-sex intimacy and denying equal treatment to gay people.

The State simultaneously claims that gay people are a small minority whose "significant political power" explains why more than half the nation now supports allowing same-sex couples to marry, and that gay people are a "large and amorphous class" like "'poor' people" or the "mentally disabled" who therefore cannot constitute "a discrete group." Resp. Br. 49, 51. The State's conflicting arguments underscore why the political process continues to enact and fail to rectify discriminatory classifications based on sexual orientation.

2. The marriage bans deny gay people "'the protection of equal laws.'" *Romer*, 517 U.S. at 633-34 (citations omitted).

In depicting the bans as merely "[p]roviding public benefits" to opposite-sex relationships, Resp. Br. 18, the State ignores the constitutional significance of civil marriage – a government institution providing a panoply of legal protections, benefits, and status for personal and family relationships. The Equal Protection Clause embodies a "commitment to the law's neutrality where the rights of persons are at stake," and the marriage bans exhibit no such neutrality. *Romer,* 517 U.S. at 623. The bans deny to Petitioners the many attendant protections of marriage, including those safeguarding couples' intimacy and autonomy, *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), as well as those that facilitate "ordinary civic life in a free society." *Romer*, 517 U.S. at 631; Pet. Br. 24-27; ABA Br. 8-29.

The State wrongly insists that restricting marriage to different-sex couples "does not disparage" same-sex relationships. Resp. Br. 18. The State's brief, however, demonstrates that its reasons for excluding same-sex couples from marriage trivialize gay people's constitutionally protected intimate relationships. For example, the State's argument that loving and committed same-sex relationships may be excluded from marital protection compares same-sex relationships to platonic friendships, which receive no constitutional sanctuary. Resp. Br. 31-32.

The bans also place gay people "in a solitary class . . . in both the private and governmental spheres." *Romer*, 517 U.S. at 627. They therefore violate the cherished principle that the law "neither knows nor tolerates classes among citizens." *Id.* at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). Only same-sex couples are in the untoward position of enjoying constitutional protection for their intimate relationships, *Lawrence*, 539 U.S. at 574, 578, while having those relationships demeaned as "[un]worthy of dignity in the community," and "[un]worthy of" the "protection[s]" of marriage. *Windsor*, 133 S. Ct. at 2692. The bans further deny gay people the "protection" of the laws, *Romer*, 517 U.S. at 633, by forbidding *any* legal recognition of "any similar union" that might provide access to discrete protections for same-sex couples' intimate lives and families.

C. The Marriage Bans Fail Rational Basis Review

1. The State's primary constitutional defenses depend on two unpersuasive constructs.

First, the State relies on a hollowed-out conception of marriage – largely developed as a post-hoc justification – that inaccurately depicts marriage as solely about responsible procreation. Resp. Br. 17 ("[T]he state's interest in marriage has always been to encourage individuals with the inherent capacity to bear children to enter a union that supports raising children."). The State's account of marriage bears little resemblance to actual marriage law in Michigan or other states, which focuses on the spousal bond, not the capacity to bear children. Under state law, marriage establishes a legally enforceable commitment from one spouse to another, obligating them to remain married until the state decrees otherwise. See, *e.g.*, Mich. Comp. Laws §551.2 (2015) (marriage is a "civil contract"); Pet. Br. 14, 24-27 (marriage law facilitates stable households for committed adult relationships whether or not they result in children); Family Law Scholars Amici Br. 4-8 ("Family Scholars") (marriage laws emphasize spousal relationship). State law also recognizes how marriage affirms a couple's intimate bond. See, *e.g.*, *Carter v. Hill*, 45 N.W. 988, 989 (Mich. 1890) (marital privilege "preserve[s] with sacredness the confidences of the marriage state").

The State maintains that some state cases describe procreation as the essence of marriage. Resp. Br. 17. But the cases it cites recognize other purposes to marriage, including the "promotion of the happiness of the parties by the society of each other." *Gard v. Gard*, 169 N.W. 908, 909-10 (Mich. 1918); see *Baker v. Baker*, 13 Cal. 87, 103 (1859) (same); *State v. Fry*, 4 Mo. 120, 126 (1835) (in marriage "each acquires a right in the person of the other for the purpose of mutual happiness"). *Gard* involved an annulment where a wife had misrepresented to her husband before marriage that she was pregnant with his child; its discussion of the State's interest in procreation concerned an interest in legitimacy. 169 N.W. at 909-10 (describing interest as "the procreation of children, who shall with certainty be known by their parents as the pure offspring of their union"); Historians of Marriage Amicus Br. 6-7 (legitimation of children among state interests in marriage).

Second, relying on *Johnson v. Robison*, 415 U.S. 361, 383 (1974), the State insists it need not offer any legitimate purpose for excluding a particular group but need only articulate why the "inclusion of one group promotes a legitimate governmental purpose." Resp. Br. 11, 35-37. This myopic approach disregards the numerous cases requiring a rational explanation for why legal *exclusions* rationally further a legitimate state interest. Pet. Br. 33-35. The reason is plain: A law that causes harm must be explained by reference to those who are harmed, and a classification must be explained by reference to those classified

as excluded. *Romer*, 517 U.S. at 626-35; *Cleburne*, 473 U.S. at 449 (rational-basis review requires showing why "the characteristics of the . . . [plaintiffs] rationally justify denying [them] what would be permitted to [other] groups").

The State also misunderstands *Robison*. In upholding a program providing educational benefits to active-duty veterans but not to conscientious objectors, this Court did not focus solely on whether including veterans furthered the government's interest in encouraging military service. Rather, the Court determined whether the included *and excluded* groups were similarly situated with respect to that interest and concluded they were not. The State would have the Court skip *any* inquiry into whether same-sex couples are similarly situated to different-sex couples with respect to the purposes of marriage. See *Cleburne*, 473 U.S. at 432 (noting that defendant's "concern . . . can hardly be based on a distinction between" excluded plaintiffs and others not excluded). Additionally, in *Robison*, there was no argument that the relevant benefits were provided to persons who failed to further the government's identified interest; the legislative objectives of the challenged program were not seriously disputed. See 415 U.S. at 378.

2. The State attempts to define away the constitutional issues by tethering the State's interest in marriage to the "feature of opposite-sex relationships that is biologically different from all other relationships" – the ability to create children. Resp. Br. 32.

However, excluding same-sex couples from marriage bears no rational relationship to the desire to offer protections to couples who may procreate biologically. States offer different-sex couples nothing additional by excluding same-sex couples from marriage. And there is no rational account of how discriminating against same-sex relationships affects different-sex couples' parenting decisions, inclinations to marry, or marital birth rates. Gates Br. 18 (summarizing studies in social science journals); J.A. 113-15.

Same-sex couples are also similarly situated to many different-sex couples who are permitted to marry with no regard for whether they will "procreate biologically." States allow persons of advanced age as well as women over 55 to marry. States confirm different-sex couples' parentage of children conceived through assisted reproduction,[2] and allow married couples to adopt children biologically unrelated to them and to establish legal parentage in ways aside from biology. Family Scholars Br. 11-18. The State thus allows different-sex couples to marry whether they have children or children genetically connected to either parent. Yet it refuses to do the same for same-sex couples, including those similarly situated to different-sex couples in how and whether they bring children into a marriage. Pet. Br. 35-37.

---

[2] One in eight couples (12% of married women) has fertility issues. RESOLVE: The National Infertility Association, Fast Facts about Fertility, at http://www.resolve.org/about/fast-facts-about-fertility.html (last viewed April 15, 2015).

The State's marital policies belie its suggestion that responsible procreation is the aim of marriage. See *Cleburne*, 473 U.S. at 447-50. The State's fear that allowing same-sex couples to marry will "change" the "meaning" of marriage makes no sense where it already allows "non-procreative" couples to marry. Resp. Br. 35-36.

The State suggests that the Constitution forbids it from subjecting individuals to privacy-invading fertility tests. Resp. Br. 34. But the autonomy-based constraints the State identifies – concerns it elsewhere dismisses as lacking any "constitutional tether" – are why the bans themselves are unconstitutional. The bans violate individuals' autonomy to define their personal and familial lives consistent with their sexual orientation. The State's purported interests in "connect[ing] sexuality . . . with marriage" and "connect[ing] . . . having children with . . . marriage" only illustrate why the bans implicate same-sex couples' rights to autonomy. Resp. Br. 35-36. The State's argument seems to rest on a preferred sexuality – different-sex sexuality over same-sex sexuality – and seeks to discourage same-sex intimacy. However, "[p]ersons in a homosexual relationship" retain the same "autonomy for" "the[ir] most intimate and personal choices" "as heterosexual persons." *Lawrence*, 539 U.S. at 574. If the State instead means it would like to uniquely discourage same-sex couples from procreating or raising children, the bans merit the kind of heightened scrutiny applicable to laws implicating such fundamental decisions as whether to

"bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).[3]

3. The State also claims that "[i]t is within the realm of reason to believe that children benefit from being raised by both a mother and a father." Resp. Br. 39. The State's speculation about optimal parenting structures, however, is not rationally related to the bans. The bans force same-sex couples to parent outside of marriage. They deny to children of same-sex couples the child-rearing structure the State *prefers* – the protections and stability that come with growing up in a home with married parents. See *Windsor*, 133 S. Ct. at 2694-95; Resp. Br. 32 (noting "marriage definition is designed to stabilize . . . relationships" that involve raising children).[4] The State notes that with "any marriage definition" children "will be raised by unmarried persons," but the bans bar couples from marrying who are not "unwilling to marry." Resp. Br. 19.

The bans are not rationally related to parenting outcomes for other reasons. They prohibit every

---

[3] The Bipartisan Legal Advisory Group similarly argued, and this Court in *Windsor* did not accept, that DOMA was justified as furthering "responsible procreation." Brief on the Merits for Bipartisan Legal Advisory Group of the U.S. House of Representatives at 11, 21, *Windsor*, 133 S. Ct. 2675 (No. 12-307).

[4] Same-sex couples, particularly married couples, represent a disproportionately large portion of adoptive and foster parents and play an outsized role in caring for America's most vulnerable children. Gates Br. 10-14; J.A. 75-76.

same-sex couple, regardless of parenting ability, from marrying but do not penalize any other class of potentially non-optimal parents (or their children) by categorically denying them the protections of marriage. See Pet. Br. 38. There is also no reason to believe – besides the State's unsubstantiated speculation – that allowing same-sex couples to marry affects different-sex couples' decisions to marry or raise children in a marriage, and the evidence is to the contrary. J.A. 113-15.

The State's implicit view that different-sex couples – "a mother and a father" – are better parents is contradicted by the established consensus of medical, psychological, and social welfare experts. J.A. 66-69; APA Br. 18-29; ASA Br. 5-27. It also contradicts the extensive evidence from this case's nine-day trial that focused on what factors contribute to healthy child development.[5] The district court found that parents' biological relationship to their children, parents' sex, and parents' sexual orientation were not

---

[5] The district court concluded that the State's witnesses were "unbelievable." Pet. App. 122a-23a. The State now complains that its asserted rationales "do not have to be proved by evidence at trial." Resp. Br. 30. But a plaintiff "may introduce evidence" that shows a state law violates the Equal Protection Clause. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 46 (1981); see *Cleburne*, 473 U.S. at 442 n.9 (crediting trial testimony on social-science questions).

rationally related to children's psychological adjustment. Pet. Br. 10-16; Pet. App. 109a, 127a-31a.[6]

Despite the State's claims to the contrary, its preference for different-sex couples impermissibly relies on stereotypes about men and women's respective parenting views and styles. Resp. Br. 39-40. The State's brief, replete with references to the "important viewpoints and contributions" of men and women and "biological complementarity," speaks for itself. Resp. Br. 39-40. The State's citations to *Nguyen v. INS*, 533 U.S. 53, 73 (2001), and other cases do not justify the stereotypes the State relies on because those cases addressed the biological fact that women, not men, bear children. Resp. Br. 38, 55-56.

4. As a final resort, the State asserts an interest in proceeding with caution. Resp. Br. 41. *Windsor*, however, recognized "the urgency of this issue for same-sex couples," 133 S. Ct. at 2689, and the harms

---

[6] The State misrepresents Petitioners' experts' testimony by suggesting they "agree" that "different sexes bring different contributions to parenting." Resp. Br. 35. Professor Nancy Cott, a historian, when asked by Michigan's counsel if "there are different benefits to mothering versus fathering," said, "[t]here may be. I, I am not a psychological expert." J.A. 168-69. Psychologist Dr. Brodzinsky did not simply state there are "differences in the ways that mothers and fathers interact with their children" "on average." J.A. 35-39. Dr. Brodzinsky explained that "both men and women do the same kinds of things," that parenting roles vary between and within families with no harm to children, and that mothers and fathers are equally capable of fully meeting children's needs. J.A. 35-39.

that waiting inflicts on families like Petitioners. Pet. Br. 24-27; Colage Amici Br. In Support Of Certiorari 23-34; see *Watson v. City of Memphis*, 373 U.S. 526, 533 (1963) ("The basic guarantees of our Constitution are warrants for the here and now."). There is also nothing to wait for. The evidence is in: Married same-sex couples live for their families and communities to see, and there is no credible argument for denying marriage to same-sex couples. Appeals to caution do not justify laws that discriminate based on particular characteristics, *Frontiero v. Richardson*, 411 U.S. 677 (1973), or implicate fundamental rights. In *Loving*, this Court rejected Virginia's argument that "caution" justified anti-miscegenation statutes, and it should reject the State's similar appeal here. See Brief of Appellee at 46, *Loving*, 388 U.S. 1 (No. 395). The State's appeal rings especially hollow given the lack of caution in enacting a constitutional amendment that indefinitely entrenches discrimination into law.

The State argues it could not defend a variety of other laws if Petitioners' arguments succeed. Resp. Br. 31, 33-35. But even minimal equal protection review requires state governments to identify some legitimate purpose and explain how its laws are rationally connected to that purpose, and the bans fail that standard. Pet. Br. 38-42.

III. The Marriage Bans Deprive Petitioners Of A Fundamental Liberty Interest

A. The State also has no real answer to Petitioners' showing that the bans violate due process by denying same-sex couples the fundamental right to marry. It asserts without citation that "if a state got out of the business of recognizing relationships entirely . . . there would be no constitutional injury to anyone." Resp. Br. 27. However, numerous cases affirm that civil marriage is a fundamental right – it could not be wholly withdrawn without constitutional objection. See *supra* Part I.A; Pet. Br. 56-57, 62-63.

The State next accuses Petitioners of transforming the substantive-due-process doctrine from a "shield" for "negative" rights into a "sword" "that guarantees positive rights." Resp. Br. 27. But because marriage exists only as a matter of civil law, the right to marry functionally operates as a right to have one's marriage licensed by the state. For that reason, *Loving*, *Zablocki* and *Turner v. Safley*, 482 U.S. 78, 95 (1987), all effectively required states to license particular marriages. The State's argument, and its reliance on cases like *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989), misunderstands the nature of marriage. Resp. Br. 27. *DeShaney* addressed the states' obligation to protect "against invasion[s] by private actors" or to provide government aid. 489 U.S. at 195. Marriage, by contrast, is partially a "right" of autonomy that protects couples' ability to construct their personal identities and relationships, *Griswold*, 381 U.S. at 495

(Goldberg, J., concurring), Pet. Br. 56-57, and guarantees each spouse's freedom to make legal, medical, and other decisions for a couple's family. Pet. Br. 24-27. Same-sex couples are entitled to these guarantees of liberty just as different-sex couples are.

B. The State alternatively would define the contours of the right to marry such that it can only be exercised by those who have traditionally enjoyed it, or otherwise define the right so narrowly it ceases to be recognizable. The State suggests fundamental rights are defined as "practice[s] . . . accepted by the Framers [that have] withstood the critical scrutiny of time and political change." Resp. Br. 20, 22 (quotation omitted). "'History and tradition,'" however, "'are the starting point but not in all cases the ending point of the substantive due process inquiry.'" *Lawrence*, 539 U.S. at 572 (citation omitted); Pet. Br. 57-62; Laurence Tribe & Michael Dorf Amicus Br. 9-13. This aspect of due process is necessary to "correct . . . injustice[s] . . . not earlier known or understood." *Windsor*, 133 S. Ct. at 2689. *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), does not say otherwise. See Resp. Br. 23-24. That case involved the Establishment Clause. U.S. Const. amend. I. It did not dictate how fundamental rights are defined and it did not involve an exclusion of an entire class based on identity.

The State then seeks to define marriage in a way that drains it of its constitutional significance. It first equates the "right to marriage" with different-sex marriage by claiming that "the opposite-sex right to

procreate . . . is the key reason why this Court has recognized any due-process right in marriage at all." Resp. Br. 24. But our legal tradition has defined the right as a protection for more than procreation: It protects "expressions of emotional support and public commitment," *Turner*, 482 U.S. at 95; "expression[s] of personal dedication," *id.* at 96, "acknowledgment[s] of [an] intimate relationship," *Windsor*, 133 S. Ct. at 2692; "coming together for better or for worse," *Griswold*, 381 U.S. at 487; and other features unrelated to procreation. Pet. Br. 62-63; *In re Marriage Cases*, 183 P.3d 384, 419-32 (Cal. 2008). Indeed, *Lawrence* recognized that "it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." 539 U.S. at 567. The personal bonds and love that marriage recognizes stand for more than couples' ability to procreate in a particular way.

The State's account of the contours of the right to marry also fails to explain *Turner*. *Turner* invalidated a prison restriction that only permitted prisoners to marry in cases involving "pregnancy or birth of a child" because it violated prisoners' right to marriage. 482 U.S. at 96-97. The Court, therefore, rejected the idea that the right to marriage exists only to safeguard couples' ability to procreate. The Court distinguished a prior summary affirmance involving a "prohibition on marriage only for inmates sentenced to life imprisonment" because "importantly, denial of the right was part of the punishment for [the] crime." *Id.* at 96.

The State also asserts that "[t]here are . . . many competing views on the nature and purpose of . . . marriage," and that it has adopted the "conjugal" version that views marriage as a union for purposes of raising a family. Resp. Br. 1, 3. But the existence of different accounts of marriage does not change its core constitutional "elements." *Turner*, 482 U.S. at 96. Same-sex couples, no less than different-sex couples, may form the kinds of "enduring" and "personal bond[s]," *Lawrence*, 539 U.S. at 567, "sufficient to form a constitutionally protected marital relationship." *Turner*, 482 U.S. at 96. Same-sex couples are also similarly situated to many different-sex couples with respect to the goal of raising children in a family. The bans merely preclude same-sex couples from raising children in a home with the protections and stability of marriage. To the extent that there are multiple accounts of marriage, different-sex couples who aspire to either version of marriage are free to marry while same-sex couples similarly situated to them are denied the ability to do so.

Finally, the State is wrong to suggest that invalidating the marriage bans would invalidate restrictions on polygamy or youth. Resp. Br. 19, 23. This "case does not involve minors. . . . [It] involve[s] two adults." *Lawrence*, 539 U.S. at 578. And the fundamental right to marriage is a "bilateral loyalty," *Griswold*, 381 U.S. at 486, "between two people." *Windsor*, 133 S. Ct. at 2692. The restrictions the State identifies also do not delegitimize an entire category of relationships that define particular identities, or

deny freedom to "enter into the marital relationship" at all. *Zablocki*, 434 U.S. at 386. Age restrictions only defer, rather than deny, marriage rights. The Court should reject these calls to limit the right to marriage just as it did in *Loving*. See MAY IT PLEASE THE COURT 282-283 (Peter Irons & Stephanie Guitton eds., 1993) (Virginia argued "the state's prohibition of interracial marriage . . . stands on the same footing as the prohibition of polygamous marriage . . . or the prescription of minimum ages . . . ").

* * *

Marriage is "the most important relation in life." *Maynard v. Hill*, 125 U.S. 190, 205 (1888). It cannot be denied to loving adult couples based on sexual orientation alone.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

KENNETH M. MOGILL
MOGILL, POSNER & COHEN
27 E. Flint St., 2nd Floor
Lake Orion, MI 48362
(248) 814-9470

DANA M. NESSEL
NESSEL & KESSEL LAW
645 Griswold, Suite 4300
Detroit, MI 48226
(313) 556-2300

MARY L. BONAUTO
GAY & LESBIAN ADVOCATES
& DEFENDERS
30 Winter St., Suite 800
Boston, MA 02108
(617) 426-1350

CAROLE M. STANYAR
Counsel of Record
221 N. Main St., Suite 300
Ann Arbor, MI 48104
(313) 819-3953
cstanyar@wowway.com

ROBERT A. SEDLER
WAYNE STATE UNIVERSITY
LAW SCHOOL
471 W. Palmer St.
Detroit, MI 48202
(313) 577-3968

Counsel for Petitioners

April 17, 2015